U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

April 14, 2008

BY HAND

The Honorable Jed S. Rakoff
United States District Judge
Southern District of New York
United States Courthouse
500 Pearl Street
New York, New York 10007

Re: United States v. Omar Maldonado
S1 08 Cr. 231 (JSR)

Dear Judge Rakoff:

The Government respectfully submits this letter-brief in support of a motion in limine to admit evidence pursuant to Rule 404(b) of the Federal Rules of Evidence concerning the defendant's possession of a gun in the past. As set forth below, if the defendant claims that he lacked the knowledge, intent, or opportunity to commit the charged offense, or that he committed the offense as a result of a mistake or accident, this evidence is admissible to demonstrate the defendant's knowledge of and intent and opportunity to carry, as well as his lack of mistake or accident in carrying, a loaded firearm.[1]

Background

The defendant is charged in Count One of the Superseding Indictment with possessing a firearm and ammunition as a convicted felon. The Government presently expects that its evidence at trial will show that on February 23, 2008, as an unmarked police car pulled over the livery cab in which the defendant and another man were passengers, the defendant threw a .22 caliber handgun loaded with four bullets out of the window beside him.

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[1] In addition, the Government is currently engaged in a review of audiotapes of the defendant's telephone calls from prison, which the Government both received and turned over to the defense on Friday, April 11, 2008. While the Government does not at this time seek to admit any of the calls in its case-in-chief, the Government may offer the calls as impeachment evidence or, depending upon the outcome of its review, as admissions of the defendant pursuant to Federal Rule of Evidence 801(d)(2)(A).

The Government has information that this was not the first gun the defendant possessed. The defendant was arrested on July 14, 2004, for criminal possession of a loaded firearm. If the defendant claims that he lacked the knowledge, intent or opportunity to commit the charged offense, or that his possession was a mistake or accident, the Government intends to offer evidence of his possession of a loaded gun on July 14, 2004. As set forth below, such evidence is probative, relevant, and admissible in this trial.[2]

Discussion

A "trial court has broad discretion to admit 'other crimes' evidence under Rule 404(b), and its ruling will not be overturned on appeal absent abuse of discretion." United States v. Rosa, 11 F.3d 315, 333-34 (2d Cir. 1993). "To find such an abuse [the Court of Appeals] must be persuaded that the trial judge ruled in an arbitrary and irrational fashion." United States v. Pipola, 83 F.3d 556, 566 (2d Cir. 1996) (citing United States v. Pitre, 960 F.2d 1112, 1119 (2d Cir. 1992)).

Rule 404(b) provides, in relevant part, that:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . .

Fed. R. Evid. 404(b). In Pitre, the Second Circuit set forth the standards for assessing the admissibility of evidence under Rule 404(b):

> First, the district court must determine if the evidence is offered for a proper purpose, one other than to prove the defendant's bad character or criminal propensity. If the evidence is offered for a proper purpose, the district court must next determine if the evidence is relevant to an issue in the case, and, if relevant, whether its probative value is substantially outweighed by the danger of unfair prejudice. Finally, upon request, the district court must give an appropriate limiting instruction to the jury.

960 F.2d at 1119 (internal citation omitted); see also United States v. Miller, 895 F.2d 1431, 1436 (D.C. Cir. 1990) ("[A]ny purpose for which bad acts evidence is introduced is a proper

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[2] By this brief, the Government gives the defendant notice of its intention to seek admission of this evidence pursuant to Rule 404(b).

purpose so long as the evidence is not offered solely to prove character.").

The Second Circuit has taken an "inclusionary approach" to admitting evidence under Rule 404(b). See United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994); United States v. LaSanta, 978 F.2d 1300, 1307 (2d. Cir. 1992); Pitre, 960 F.2d at 1118-19; United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990). The admission of extrinsic evidence concerning a defendant's prior conduct is particularly appropriate where the defendant's state of mind – such as the question of knowledge, intent, opportunity, or lack of mistake or accident – is at issue:

> Federal Rule of Evidence 404(b) . . . generally prohibits the introduction of extrinsic acts that might adversely reflect on the actor's character, unless the evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge. Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct.

Huddleston v. United States, 485 U.S. 681, 685 (1988); see also 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶ 404[13], at 404-98 to 404-102.

In the context of gun possession cases, the Second Circuit has held that evidence of other possession of firearms is properly admitted to show "intent . . . knowledge . . . or absence of mistake or accident'" where such items are in issue. United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (quoting Rule 404(b)) (affirming conviction where evidence was admitted concerning guns that were possessed contemporaneously). Several other circuit courts agree. See United States v. Cassell, 292 F.3d 788, 794 (D.C. Cir. 2002) ("[E]vidence of [defendant's] prior gun possessions was relevant to show his knowledge of and intent to possess the firearms recovered."); United States v. King, 254 F.3d 1098, 1100 (D.C. Cir. 2001) ("[I]n cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged."); United States v. Davis, 154 F.3d 772, 779-80 (8th Cir. 1998) (holding that evidence of prior arrest for possession of a firearm is admissible to prove knowledge in a firearm trial); United States v. Mills, 29 F.3d 545, 549 (10th Cir. 1994) ("Use of prior acts to show knowledge is a proper purpose under Rule 404(b) and knowledge is relevant to establish scienter for [a] possession of a firearm violation."); United States v. Gomez, 927 F.2d 1530, 1534 (11th Cir. 1991) (prior conviction of possession of firearms relevant to current charge of possession of firearm to rebut claim that the current firearm possession was for an "innocent purpose" or "was mere accident or coincidence"); United States v. Davis, 792 F.2d 1299, 1305 (5th Cir. 1986) (holding that evidence of a defendant's prior possession of the same weapons was admissible to establish that his charged possession was knowing).

The conclusion of the United States Court of Appeals for the District of Columbia Circuit in Cassell, 292 F.3d 788, is instructive. On appeal, the defendant argued that because he made a "lack of possession" defense, rather than a "lack of knowledge" defense, his prior gun possession arrest should not have been admitted pursuant to Rule 404(b). Id. at 792. The appeals court rejected this distinction, holding that "the concepts of knowledge and intent are [not] so easily separated from possession in this case." Id. at 793. The Court further observed:

> the elements of [the defendant's] crime included possession, which in turn requires knowledge and intent. *A prior history of intentionally possessing guns, or for that matter chattels of any sort, is certainly relevant to the determination of whether a person in proximity to such a chattel on the occasion under litigation knew what he was possessing and intended to do so.*

Id. at 794-95 (emphasis added).

Before admitting the evidence, the Court must determine whether the proffered evidence is admissible under Rule 403 of the Federal Rules of Evidence ("Rule 403"), which sets forth a balancing test for evidence that is at once probative and prejudicial. That rule provides that evidence, although relevant, may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

"In reviewing a challenge to a Rule 403 balancing, [the Second Circuit] must look at the evidence in a light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect." United States v. Rubin, 37 F.3d 49, 53 (2d Cir. 1994). "'Unfair prejudice' within [Rule 403's] context means an undue tendency to suggest decision on an improper basis commonly, though not necessarily, an emotional one." Advisory Committee's Notes on Rule 403. As the Second Circuit explained in United States v. Jimenez:

> To be sure, all evidence incriminating a defendant is, in one sense of the term, "prejudicial" to him: that is, it does harm to him. What "prejudice" as used in Rule 403 means is that the admission is, as the rule itself literally requires, "unfair" rather than "harmful."

789 F.2d 167, 171 (2d Cir. 1986); see Oregon v. Kennedy, 456 U.S. 667, 674 (1982) ("Every act on the part of a rational prosecutor during a trial is designed to 'prejudice' the defendant by placing before the judge or jury evidence leading to a finding of his guilt."); see also United States v. Gilliam, 994 F.2d 97, 100 (2d Cir. 1993) ("'[e]vidence is prejudicial only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence'") (quoting United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980).

The defendant's prior gun possession is highly probative with respect to the issues of knowledge, intent, opportunity and lack of mistake or accident in this case. The defenses that will potentially be advanced at trial in this case include that the defendant was merely present in the taxi with someone else who possessed or discarded a gun, and with respect to such defenses, the defendant's knowledge, intent, opportunity, or lack of mistake or accident will be in issue. "When the defendant disavows awareness that a crime was being perpetrated, and the government bears the burden of proving the defendant's knowing possession as an element of the crime, knowledge is properly put in issue." United States v. Ramirez, 894 F.2d 565, 568 (2d Cir. 1990). "Where a defendant claims that he was merely present, introducing a prior crime to prove knowledge and intent presents 'a classic use of similar act evidence.'" United States v. Greo, No. 85 Cr. 961 (JFK), 1994 WL 202605, at *2 (S.D.N.Y. May 23, 1994) (quoting United States v. DeFillippo, 590 F.2d 1228, 1240 (2d Cir. 1979)); see also United States v. Brown, 961 F.2d 1039, 1041 (2d Cir. 1992) (evidence of other gun possessions properly admitted to rebut defense that "access of others to [defendant's] apartment" might account for presence of firearm). "[I]n cases where a defendant is charged with unlawful possession of something, evidence that he possessed the same or similar things at other times is often quite relevant to his knowledge and intent with regard to the crime charged." United States v. King, 254 F.3d 1098, 1100 (D.C. Cir. 2001) (citing Huddleston v. United States, 485 U.S. 681 (1988)).

In addition to being admissible for a proper purpose, the evidence satisfies the other requirements of the Federal Rules of Evidence. "If the evidence is offered for such a proper purpose, the district court then must determine whether the offered evidence is relevant, per Rules 401 and 402, to an issue in the case, and whether the evidence satisfies the probative-prejudice balancing test of Fed. R. Evid. 403." Colon, 880 F.2d at 656 (internal quotation marks and alterations omitted). If requested to do so, the trial court must give an appropriate limiting instruction to the jury. See, e.g., United States v. Ortiz, 857 F.2d 900, 903 (2d Cir. 1988).

Finally, in addition to being highly probative and relevant to the issues of knowledge, intent, opportunity and lack of mistake or accident, the evidence satisfies the protections of Rule 403 against unfairly prejudicial evidence. The fact that the defendant possessed a gun in the past does not unduly prejudice his expected defense that he did not possess or intend to possess a gun during this incident. Moreover, to the extent the defendant asserts that the fact that he possessed a firearm in the past would be prejudicial, any such prejudice would not be unfair, an explicit requirement of the Rule, given that the charges here are no less serious than the past offense. See United States v. Roldan-Zapata, 916 F.2d 795, 804 (2d Cir. 1990) (404(b) evidence not highly prejudicial because "it did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged").

Conclusion

For the reasons set forth above, the Government respectfully submits that the proffered evidence of the 2004 gun possession is admissible.

Respectfully submitted,

MICHAEL J. GARCIA
United States Attorney

By: [signature]
Nicole W. Friedlander
Assistant U.S. Attorney
(212) 637-2211

cc: Deirdre D. Von Dornum, Esq. (by facsimile)